IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1978

No. 77-1407

David Kitsis,

Petitioner,

vs.

The State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF L.A., STATE OF CALIFORNIA

Joshua Kaplan, A Member Of
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Los Angeles, CA 90010
Telephone: 213/381-1121

of Counsel

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____ Term, 1978

No. _____

_____

David Kitsis,

Petitioner,

vs.

The State of California,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF L.A., STATE OF CALIFORNIA

Petitioner David Kitsis prays that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Department of the Superior Court, County of Los Angeles, State of California, which affirmed the Judgment of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in which petitioner was

convicted of a violation of California Business and Professions Code section 6152 (solicitation of professional employment as an attorney).

Proceedings Below

The judgment of conviction herein was made and entered on or about April 1, 1976 by plea of guilty to a violation of California Business and Professions Code §6152, to wit: That Petitioner attorney aided and encouraged another to solicit professional employment for petition as an attorney. Thereafter, on or about December 21, 1977, the appellate judgment affirming the conviction and rejecting the constitutional assertions herein, infra, was filed by way of written opinion by the Appellate Department of the Superior Court, County of Los Angeles, State of California, (Appendix "A"). Thereafter, on or about January 11, 1978,

the Court of Appeal of the State of California, Second Appellate District, entered its order denying transfer of the matter to it pursuant to California Rules of Court, rule 62(a). (Appendix "B"). Pursuant to said rule and California Penal Code §1471, no further State Court Appellate review may be had in this matter and it has been reviewed by the highest state court in which a decision could be had.

Jurisdiction

The date of the judgment sought to be reviewed is December 21, 1977 and the jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

Questions Presented

Whether California Business and Professions Code §6152 is violative of the First Amendment of the United States Constitution when the application thereof to an attorney results in a judgment of criminal conviction based upon his

encouraging or aiding another to solicit professional employment for him and without claim or finding of misrepresentation, overreaching, fraud, encouragement of false claims, or other action contrary to the public welfare or the welfare or interests of his clients.

Constitutional and Statutory Provisions

This case involves the First (and to the extent the First Amendment applies to the states, the Fourteenth Amendment) of the United States Constitution and California Business and Professions Code §6152.

First Amendment:

"Section 1 ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of laws ..."

California Business and Professions Code §6152:

"(a) It is unlawful for:

(1) Any person, in his individual capacity or in his capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any such attorneys or to solicit any business for any such attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals,

justice courts, municipal courts, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever. ..."

Statement Of The Cause

Petitioner, David Kitsis, was convicted of a violation of California Business and Professions Code §6152 based upon his plea of guilty to one count of a complaint alleging a violation thereof in that he aided and encouraged one Esther Gonzales to solicit employment for petitioner as an attorney in and about a hospital.

Petitioner duly raised and presented the constitutional issues set forth

herein before the trial court and before the appellate court which heard his matter as aforesaid. Both courts rejected Petitioner's contentions. Petitioner now seeks relief by way of this Petition which presents an issue unresolved in Bates v. State Bar of Arizona, 433 U.S. ___, 97 S.Ct. 2691 and similar to those presented in Ohralik v. Ohio State Bar Association, docketed in this Court as No. 76-1650 and In The Matter of Edna Smith, docketed in this Court as No. 77-56.

Reasons For Granting The Writ

I. CALIFORNIA BUSINESS AND PROFESSIONS CODE §6152 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In Bates v. State Bar of Arizona, 433 U.S. ___, 97 S.Ct. 2691, 2708, (1977) this Court held that "...advertising by

attorneys may not be subjected to blanket suppression ..." (emphasis added) within the context of State Bar disciplinary rules proscribing truthful newspaper advertisements regarding routine legal services.

This petition seeks a determination as to whether such a "blanket suppression" can be countenanced under the First Amendment within the context of state criminal statutes applied to impose penal sanctions for truthful oral solicitation of legal representation absent a state showing of fraud, coercion, overreaching, vexations or harassing conduct or injury to the interests of the recipients of the solicitation. Not only was this entire issue expressly reserved in Bates, supra; the penal aspect thereof is not specifically raised in Ohralik (docketed in this Court as No. 76-1650).

Petitioner respectfully submits

that our analysis of section 6152 must thus not only utilize the sensitive tools mandated by the First Amendment, it must also proceed in light of the extraordinary specificity required of penal statutes regulating speech so that we can prevent the exercise of unbridled discretion by enforcement officials in interpreting the applicability of this statute. Smith v. People, 361 U.S. 147, 151; 80 S.Ct. 215, 217 (1959).

Petitioner submits that the penal statute here at issue is patently capable of many unconstitutional applications, denies consumers most in need of such services their right to receive information concerning such services, threatens those who validly exercise their rights of free expression with the unconstitutional deterrence of criminal prosecution at the whim and unbridled discretion of enforcement officials and is subject to

the following constitutional infirmities:

1. Section 6152 sets forth a blanket proscription of solicitation, whether or not the act of solicitation was expressly invited or requested by the consumer.

2. Section 6152 sets forth a blanket proscription of solicitation by a "runner" or "capper" acting in any manner (Section 6151).

Consequently, the section 6152 proscribes letters, pamphlets, circulars or other papers distributed or marked by the "runner" or "capper" to the consumer, whether or not such written information was requested by the consumer.

3. Section 6152's proscription applies even to those "runners" or "cappers" who have a personal financial or pecuniary interest in the outcome of the litigation procured for the attorney.

4. Most frightening, the statute would include organizations like the

N.A.A.C.P. which attempt to "procure" cases for their attorneys which involve important civil rights or public policy issues. The section does not require that the "runner" or "capper" be engaged in soliciting for profit. (See N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963), where a Virginia statute similar to the one herein and prohibiting solicitation of legal business was held to violate First Amendment freedom of speech and of association. 83 S.Ct. at 333-334. Justice Brennan's decision relegated the state's interest and regulating the "traditionally illegal practices of barratry, maintenance and champerty" to secondary status when compared with the importance of the N.A.A.C.P.'s work as a "capper" of important social issues cases for decision in the courts. In fact, the court's decision raises much doubt whether very much remains of the old common law doctrines

of barratry, maintenance and champerty after this country adopted the First Amendment; see 83 S.Ct. at 343-344.) Like the statute struck down in Button, Section 6152 forbids, under threat of criminal punishment, advising the employment of particular attorneys, and is consequently unconstitutional. See separate opinion by Mr. Justice White, 83 S.Ct. at 345.

5. Finally, the statute interferes with the right to receive information of those potential consumers of legal services who most need and require information. The approach of the Legislature has been to burn down cities to exterminate mice; Section 6152 establishes an informational vacuum.

> "in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city

> receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, municipal courts, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever."

This all-inclusive list includes places which most certainly constitute "public forums" in which access for First Amendment speech must be permitted. Amalgamated Food Employees Local v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); "The Public Forum: Minimum Access, Equal Access, and The First Amendment," 28 Stanford Law Review 117 (1975). This list

ignores the emerging constitutional case law which reserves to incarcerated prisoners that degree of First Amendment exercise of rights that is compatible with the reasonable security requirements of the prison.

Petitioner thus respectfully submits that section 6152 is a vague and even an overboard and anachronistic vestiage of ill-defined purposes without supporting compelling state interests.

With Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 and Bigelow v. Virginia, 421 U.S. 809, this Court held that commercial speech was entitled to certain protection under the First Amendment of the United States Constitution and at the same time seemed to leave unanswered the applicability of that holding to the legal profession.

However, in Jacoby v. State Bar,

19 Cal.3d 359, the Supreme Court of California specifically filled this void and held, supra, at 377 that Virginia Pharmacy:

> "... cannot be construed to mean that commercial speech by attorneys is entirely beyond the scope of First Amendment protection. [Rather, it] ... stands for the proposition that while First Amendment values in commercial advertising remain constant regardless of the profession involved, the governmental regulatory interest may vary from profession to profession."

Thus our State Court once again anticipated and cogently disposed of issues thereafter to be explicated by this Court (Bates v. State Bar, supra) and our Court provided crucial guidance in the analytical process upon which we must embark in the instant

matter (an analysis of the balance of competing interests so critical in the area of free speech).

More specifically, the Court's ruling in Jacoby, supra, must be seen as essentially two-fold. First, the Court fashioned and refined the test to be applied in the determination of whether certain activity is violative of our State Rule of Professional Conduct proscribing solicitation of employment. The Court held, supra, at 371-372, that only activity which is "primarily directed" toward solicitation (i.e., when "viewed in its entirety, it serves no discernible purpose other than the attraction of clients"), is violative of the Rule at issue. Second, the Court held, supra, at 377-378, that even if deemed to constitute solicitation, in that such activity enjoys certain prima facie First Amendment protection, the State has the burden of producing a compelling

interest to justify a prohibition thereof and in Jacoby, supra, the State failed to do so. For as the Court stated, supra, at 376:

> "To summarize, under the foregoing decisions petitioners' conduct must be viewed as discussion of an important issue rather than solicitation ..."

Thus, it was not "primarily directed" within the refined test for a Rule 2 violation as a matter of fact.

> "... but even to the extent their communications can be interpreted by some to be solicitation, they are still not beyond the pale of the First Amendment."

Thus, the First Amendment is seen to provide facie protection to "solicitation of clients" and the Court then concludes as follows:

"In either case, the State Bar has the burden of demonstrating that the prohibition of petitioners' contacts with news media is necessary to further a compelling state interest."

Finally, the Court concludes, supra, at 380, with a caveat that in itself constitutes an implicit reaffirmation of the recognition of certain First Amendment protection for legal solicitation and advertising. For the Court warned that it had not passed upon the State's ability to produce a compelling interest to justify a prohibition of pure legal advertising or solicitation. This the State need not even do were solicitation not entitled to such constitutional protection as aforesaid. Rather, the Court passed only upon the absence of such a compelling interest in the context of the instant matter, i.e.,

to justify a prohibition of Petitioners' media contact not "primarily directed" to attraction of clients.

Thus, the Jacoby Court has filled the void in Virginia Pharmacy, supra, and extended prima facie freedom of speech protection to legal solicitation and advertising but has left for another matter the balancing of compelling interests, if indeed the State can produce any, with regard to activity "primarily directed" to attracting clients. Thus, such solicitation is afforded constitutional protection and state regulation thereof must be justified by a compelling interest. That is the lesson of Jacoby applicable to the instant matter and Petitioner's challenge of Section 6152 (which imposes a blanket ban on legal solicitation "in any manner" and "in any public place", and is thus challenged as overbroad) is now indisputably within the highly sensitive area of

freedom of expression such that the State must produce a compelling interest to justify any regulation thereof.

Additionally, however, we have been favored with the decision in Bates, supra, which clearly confirms that legal advertising (even where "primarily directed to attracting clients") is protected by the First Amendment and leaves no doubt as to the vitality of the Jacoby holding and the validity of its explication of Virginia Pharmacy. For in Bates, supra, this Court held the application of Arizona Supreme Court's rule proscribing legal advertising to be unconstitutional under the First Amendment even though such had been applied to media advertising placed by appellants "in order to generate the necessary flow of business, that is, 'to attract clients.'" Thus, consistent with Jacoby, supra, this Court in Bates, supra, held such "primary

directed" advertising to be protected by the First Amendment and although possibly subject to limited regulation, definitely not subject to "blanket suppression." For as this Court held, supra:

> "In holding that advertising by attorneys may not be subjected to blanket suppression and that the advertisements at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way." [emphasis added].

Thus, the combined lesson of Jacoby, supra, and Bates, supra, is simply that benign legal advertising or solicitation primarily directed to attracting clients, while possibly subject to reasonable state regulation upon a showing of sufficient compelling interests, is not subject to a "blanket prohibition" under the First

Amendment of the United States Constitution.

Nevertheless, while Petitioner respectfully resubmits that California Business and Professions Code §6152 is unconstitutionally overbroad as indeed just such a "blanket suppression" of solicitation "in any manner" and "in any public place;" Petitioner feels compelled to briefly touch upon the compelling state interest aspect of this matter.

In both Jacoby supra, and in Bates, supra, the Courts analyzed and found wanting the compelling state interest proferred in support of the prohibitions challenged therein. In Jacoby, the Court held that within the context of media contact not "primarily directed toward attracting clients" that the four proferred interests were insufficient. In Bates, this Court held that within the context of media

advertising of services and prices which was indeed so primarily directed toward attracting clients, that the five proferred interests were insufficient.

While admittedly, neither case analyzed said proferred compelling interests within the context of "in person solicitation," Petitioner respectfully submits that such interests are a fortiori insufficient to support a "blanket prohibition" like Section 6152 and that said context is not especially significant. For despite what may be asserted as a qualitative distinction between the factual context of Jacoby and Bates and the factual context of the instant matter, the overbredth of Section 6152 is not cured by any reference to such distinctions and neither Jacoby or Bates offers any positive indication whatsoever of the sufficiency of such interests as to such a factual context

in that such a context was not before either Court. What both Courts did offer, however, was an expression of the unconstitutionality of blanket prohibitions of attorney advertising and solicitation and the insufficiency of the identical profered compelling interests which appellant expects respondent to nevertheless assert herein.

Finally, appellant would obviously be less than candid if a discussion of the issue of "standing and overbredth" were not briefed in light of the expressions thereon included in the Bates decision. Apparently, this Court has declined to apply the First Amendment overbredth doctrine to challenges to non-penal rules of professional conduct proscribing professional advertising. However, no such declination appears in Jacoby, supra, and Petitioner respectfully submits a

significant basis for the application of the overbredth doctrine in the instant matter.

In Bates, this Court had before it a State Supreme Court disciplinary rule and not a criminal statute as is before the Court in the instant matter. Surely, the very "chilling effect" of a "blanket prohibition" sought to be precluded by utilization of the overbredth doctrine is far more evident in the context of a criminal statute with its obvious in terrorem effect than in the context of even a coercive court disciplinary rule. For in the former, one's very liberty is at stake and one is far more likely to avoid the "prohibited zone" than risk forfeiture of his liberty. If the oral solicitation of legal employment involves speech and if commercial speech is constitutionally protected; then even under U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 restrictions

upon the exercise of the constitutional right must be narrowly drawn or "no greater than is essential to the furtherance of ... [a compelling governmental] ... interest." Such is clearly not the case with Section 6152.

Therefore, Petitioner respectfully resubmits his constitutional assault upon the blanket prohibition of Section 6152, forcefully contends that his position has been fortified by Jacoby and by Bates and most respectfully refers the Court to the able arguments in the briefs of appellant in Ohralik, supra, each and all of which Petitioner respectfully adopts and incorporates by reference herein as though set forth in full.

Conclusion

For all of the reasons and upon the grounds stated, certiorari should be granted and the judgement below should

be reversed.

Respectfully submitted,

HERTZBERG, KAPLAN & KOSLOW

By: Joshua Kaplan
JOSHUA KAPLAN
Attorneys for Petitioner
DAVID KITSIS

APPENDIX A

CERTIFIED FOR PUBLICATION

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

vs.

DAVID KITSIS,

Defendant and Appellant

Superior Court No. CR A 14452

Municipal Court of the Los Angeles Judicial District

No. 31493955

OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court.

Norman L. Epstein, Judge.

Judgment affirmed.

FILED
December 21, 1977
John J. Corcoran,
County Clerk
By L. Swart, Deput

For Appellant - Hertzberg, Kaplan & Koslow

For Respondent - Burt Pines, City Attorney
George C. Eskin, Chief Assistant City Attorney
Noel Slipsager, Assistant City Attorney
Richard M. Helgeson, Deputy City Attorney
Chief, Special Trials Section
By Richard M. Helgeson, Deputy City Attorney

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Appellant, a duly licensed member of the California Bar, pleaded guilty to a single count of violating Business and Professions Code section 6152-[1/], commonly known as "ambulance chasing."

1/ §6152. Prohibition of solicitation
(a) It is unlawful for:

(1) Any person, in his individual capacity or in his capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any such attorneys or to solicit any business for any such attorneys in and about the state prisons, county jails, city jails,

Originally, appellant raised several grounds, including a contention that this particular statute did not include attorneys at law within its ambit. However, in the interim this issue has been resolved adversely to appellant's position. (Hutchins v. Municipal Court for the Santa Monica Judigicl District of Los Angeles County [1976] 61 Cal.App.3d 77.)

A second contention related to the alleged failure to file an amended complaint, following the sustaining of a demurrer, within the 10-day period provided by Penal Code section 1008. However, the

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§6152. Cont'd
city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, municipal courts, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property or any character whatsoever.

record does not support this contention. Incident to a writ proceeding it was determined that the docket entry reflecting the sustaining of the demurrer in question was in error and that in fact the demurrer was never sustained but was eventually overruled.

Appellant's principal contention is a claim that any interference with his right to engage in in-person solicitation is an abridgement of his freedom of speech, i.e., a denial of the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article I, section 2 of the California Constitution.[2/]

2/ The First Amendment, insofar as pertinent, declares: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article I, section 2 of the California Constitution provides: "Every person may freely speak, write and

Recently, in Goldman, et al. v. State Bar of California [1977] 20 Cal.3d 130, our Supreme Court suspended two attorneys who had violated the Rules of Professional Conduct by soliciting professional employment. Their conduct was comparable to that for which appellant stands convicted. While the opinion did not deal directly with freedom of speech, the Court noted (footnote 8, id., at p. 141) that the Supreme Court of the United States, in Bates v. State Bar [1977] ____ U,S, _____ [53LEd.2d 810, 97 S. Ct. 2961),[3/] while not undertaking the resolu-

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2/ Cont'd.
publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty or speech or press."

3/ Bates held, on First Amendment grounds that the State Bar of Arizona may not "present the publication in a newspaper of [its members'] truthful advertisement concerning the avail-

tion of the matter, observed that the problems associated with in-person solicitation might well involve over-reaching and misrepresentation not encountered in newspaper advertising. One could reasonably infer from Goldman that the Supreme Court of California would not accord First Amendment protection to in-person solicitation of legal business.

The practice of law is not a business or trade; it is a profession and among the professions it is especially amenable to regulation. In this regard we cannot improve upon the language found in Goldfarb v. Virginia State Bar [1975] 421 U.S. 773, 792, 44 L.Ed.2d 572, 95 S. Ct. 2004:

> "We recognize that the States have a compelling interest in the practice of professions

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3/ Cont'd.
ability and terms of routine legal

within their boundaries, and that as part of their power to protect the public health, safety, and their valid interests they have broad powers to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' (citations) The interest of the States in regulating lawyers is especially great since lawyers are essential

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3/ Cont'd.
services." (Id., at p. _____.)

to the primary governmental function of administering justice and have historically been 'officers of the courts.' (citations)"

While lawyers cannot be deprived of constitutional rights assured to others, their special status subjects them to limitations incident to their professional lives that are consistent with due process. (Cohen v. Hurley [1961] 366 U.S. 117, 6 L.Ed.2d 156, 81 S.Ct. 954.)[4/]

Appellant leans heavily on Jacoby v. State Bar [1977] 19 Cal.3d 359. In Jacoby the court held that an attorney could not be disciplined for cooperating

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4/ In Cohen v. Hurley a lawyer was disbarred for failure to answer questions respecting his practice in connection with an "ambulance chasing" investigation. His disbarment was upheld despite his contention that in effect he was being denied his privilege against self-incrimination.

in the publication of a news article or broadcast on a newsworthy topic, even when the attorney himself is the subject. The court in Jacoby, after a thorough discussion of Belli v. State Bar [1974] 10 Cal. 3d 824, and Bigelow v. Virginia [1975] 421 U.S. 809, 44 L.Ed. 2d 600, 95 S.Ct. 2222, stated, in effect, that a communication that serves no discernible purpose other than the attraction of clients is outside the scope of First Amendment protection. (Jacoby, supra, at p. 371.) Appellant makes no contention and the statute in question obviously does not contemplate a valid purpose, e.g., the communication of information and dissemination of opinion in the sense of Bigelow v. Virginia, supra, at p. 822. The statute before us deals solely with the solicitation of clients.

In Bates v. State Bar of Arizona, supra, the court discussed at length (97 S.Ct. 2701-2707) the justifications for the restriction of the price advertising of routine legal services, e.g., uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, as against society's interest in the right to access to this information. The justifications advanced by the State Bar of Arizona were: (a) the adverse effect on professionalism; (b) the inherently misleading nature of attorney advertising; (c) the adverse effect on the administration of justice; (d) the undesirable economic effects of advertising; (e) the adverse effect of advertising on the quality of service; and (f) the difficulties of enforcement.

After balancing the respective interests, the Court upheld the right

to advertise, but in doing so it made it abundantly clear that its holding was limited to the advertising of routine legal services. (97 S.Ct., at p. 2708) It explicitly stated that it was not holding that advertising by attorneys may not be regulated in any way. (97 S.Ct., at p. 2708) By clear implication it recognized that claims with respect to the quality of legal services, necessarily a major part of in-person solicitation, presented problems of deception, extravagence, and confusion that were minimal in the performance of routine legal services. (97 S.Ct., at p. 2709) After weighing the respective contentions, the Court determined that the interest of the public in access to the information, i.e., the ability to make informed and reliable decisions, should prevail. However, while the Court sustained the

First Amendment right in Bates, the clear tenor of its opinion, including a specific disclaimer of any intent to resolve the problems associated with in-person solicitation, is that it would not accord similar protection to in-person solicitation.

Solicitation does, of course, involve speech. Speech is protected by the First Amendment from criminal prosecution except where the state has a compelling interest to limit this right. The Supreme Court of the United States, in United States v. O'Brien [1968] 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, enunciated this principle thusly:

> "This court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in

regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever impression inheres in those terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

(See Va. Pharmacy Bd. v. Va. Consumer Council [1976] 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817.)

There is no claim by appellant that the regulation of the legal profession is beyond the constitutional power of the state.

The compelling state interest involved which requires criminal prosecution is the protection of its citizens from the probability of fraud, deception, and overreaching inherent in the practice of "ambulance chasing." In-person solicitation, with its attendant employment of "high-pressure" tactics at a time when persons are least able to exercise a free and independent judgment, has an adverse impact on the process of making an intelligent, thoughtful determination as to whether or not counsel will be employed and the subsequent selection of same. As

a matter of fact it tends to diminish rather than enhance the free flow of information in that it perverts and disrupts the ordinary communication and activity incident to the public's right to select counsel of its own free will. In effect, this legislation is designed to prevent a type of consumer fraud, a matter of legitimate public concern. Speech itself is not the evil; rather, the act of entering into contracts for legal representation, to which speech is merely incidental. Clearly, this statute satisfies the compelling state interest criteria justifying a restriction on free speech.

It follows, then, that neither the First Amendment of the Federal Constitution nor Article I, section 2 of the California Constitution afford appellant an avenue of escape. Accordingly, we hold that Business and Professions Code

section 6152 is a legitimate exercise of the police power.

The judgment of conviction is affirmed.

CERTIFIED FOR PUBLICATION.

/S/ WENKE
Judge

We concur: /S/ COLE
Presiding Judge

/S/ ALARCON
Judge

APPENDIX B

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA SECOND APPELLATE

DISTRICT DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DAVID KITSIS,

Defendant and Appellant.

2 Crim. No. 31826

(Mun. Ct. No. 31493955

Super. Ct. No. CR A 14452)

MEMORANDUM

THE COURT:

The opinion of the Appellate Department of the Superior Court of Los Angeles County, which was filed and certified for publication December 21, 1977, was examined by this court within 30 days after the decision of the Appellate Department became final; and this court determined that transfer under California Rules of Court, rule 62(a), was not necessary.

PROOF OF SERVICE BY MAIL

(1013, 1013a C.C.P. (2), 2015.5 (C.C.P.))

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY

MAIL BY ATTORNEY

I, JOSHUA KAPLAN, being first duly sworn, say:

That I am and was at all times herein mentioned, a citizen of the United States, employed in the County aforesaid, and over the age of eighteen years; I further say that I am an active member of the State Bar of California, a member of Hertzberg, Kaplan & Koslow, attorneys of record in this case, and am not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

That on February 8, 1978, I served the within PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF L.A., STATE OF CALIFORNIA on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California 90010 addressed as follows:

Richard Helgeson
Deputy City Attorney
1700 City Hall East
Los Angeles, California

Honorable Norman L. Epstein
Division 40
Los Angeles Municipal Court
210 West Temple
Los Angeles, California 90012

Superior Court of Los Angeles
Appellate Department
111 N. Hill Street
Los Angeles, California 90012
Courthouse, Department 70
Room 607

JOSHUA KAPLAN

Subscribed and sworn to before me this 9th day of February, 1978.

Mina Quezada
Notary Public in and for said County and State

OFFICIAL SEAL
MINA QUEZADA
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1407

DAVID KITSIS,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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IN THE
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PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1407

DAVID KITSIS,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Appellate Department of the Superior

Court of the State of California for the County of Los Angeles, entered against Petitioner on December 21, 1977 in People v. David Kitsis, not issue.

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (Appendix "A" of the Petition) is reported at 77 Cal.App.3d Supp. 1 (1977). The unpublished memorandum order of the California Court of Appeal for the Second Appellate District denying transfer of the cause after decision in the Appellate Department is attached as Appendix "B" to the Petition.

JURISDICTION

The opinion and judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered on December 21, 1977. Pursuant to subdivisions (b) and (c) of Rule 976 of the California Rules of Court said opinion was ordered published

by said court in the Official California Appellate Reports. Said order for publication automatically caused said opinion to be reviewed by the California Court of Appeal for possible transfer of the cause to that court pursuant to Rule 62 of the California Rules of Court. Transfer was found unnecessary by the Court of Appeal on January 11, 1978.

By denial of transfer to the Court of Appeal, the opinion and judgment rendered by the Appellate Department became a final opinion and judgment rendered in the highest court of the State in which a decision could be had. See California Penal Code § 1471; California Rules of Court, Rules 62 and 107; Smith v. California, 361 U.S. 147, 149, fn. 2 [4 L.Ed.2d 205, 208, 805 S.Ct. 399] (1959); 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was convicted, on a plea of guilty, of one count of aiding, advising and encouraging a violation of California's "ambulance chasing" statute, California

Business & Professions Code § 6152, which provides, in pertinent part:

> "(a) It is unlawful for: (1) Any person, in his individual capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any such attorneys or to solicit any business for any such attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, municipal courts, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever."

California Penal Code § 31 in pertinent part provides:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed."

Petitioner claims the protection of the First and Fourteenth Amendments of the United States Constitution, which in material part declare:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

and

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether California Business & Professions Code § 6152 is unconstitutionally overbroad on its face, in violation of the First and Fourteenth Amendments of the United States Constitution, by abridging speech involved in solicitation by lay persons, at certain proscribed locations, of legal business on behalf of

attorneys by whom they are employed for that purpose.

STATEMENT OF THE CASE

Petitioner was convicted of a violation of California Business & Professions Code § 6152 on his plea of guilty to Count One of a multicount complaint[1/] which pleaded that he "did aid and abet and advise and encourage Esther Gonzales to, and Esther Gonzales did, between February 20 and March 10, 1974, act as a runner and capper for an attorney, David Kitsis, and solicit business for such attorney in and about a hospital from Juan Cavich."

By way of demurrer in the trial court, and on appeal in the Appellate Department of the Superior Court, Petitioner raised the contention that the statute and cause denied him rights guaranteed him by the First and Fourteenth Amendments.

1/ The remaining counts were dismissed, with Respondent's acquiescence, concurrent with the plea and sentence.

Because Petitioner's conviction is the result of his plea of guilty no factual record exists setting forth the underlying facts his plea admitted.

ARGUMENT

When this Court wrote, in Bates v. State Bar of Arizona, ___ U.S. ___, [53 L.Ed.2d 810, 826, 97 S.Ct. ___] (1977), that it "need not resolve the problem associated with in-person solicitation of clients - at the hospital room or the accident site, or in any other situation that breeds undue influence - by attorneys or their agents or 'runners'. . . .", it must have anticipated that a case requesting resolution of those problems would not be long in presenting itself before the court.

This is not the case.

Petitioner, an attorney at law, seeks resolution of those problems in a factual vacuum based on his attempt to vicariously assert his lay "runner" employee's First Amendment rights.

1. PETITIONER WAS CONVICTED OF EMPLOYING A LAY PERSON TO SOLICIT FOR HIM, AND NOT FOR DIRECT SOLICITATION OF A CLIENT. HE IS NOT ENTITLED TO VICARIOUSLY ASSERT HIS EMPLOYEE'S POSSIBLE FIRST AMENDMENT RIGHTS

California Business & Professions Code § 6152 prohibits, insofar as the criminal complaint in this case is concerned, the lay solicitation of legal employment of an attorney from a potential client in a hospital. The primary cause of Petitioner's conviction was his plea of guilty, but he was expressly charged with having aided, abetted, and advised and encouraged a lay person to act as his runner and capper in soliciting business on his behalf in a hospital. While California Penal Code § 31 made Petitioner a principal in the commission of the crime, Petitioner never personally sought to assert his First Amendment rights; indeed, he is seeking in this Court to assert First Amendment rights, if any, of his lay runner and capper to solicit business on his behalf. Nothing in California Business & professions Code § 6152 would have made criminal Petitioner's personal solicitation

(had it occurred) of the would-be client. Cf. Goldman v. State Bar, 20 Cal.3d 130 (1977), relevant to State Bar disciplinary action for such conduct.

One may not ordinarily assert another's constitutional rights; they are not vicarious. McGowan v. Maryland, 336 U.S. 420, 429, [6 L.Ed.2d 393, 401, 81 S.Ct. 1101] (1961); Broadrick v. Oklahoma, 413 U.S. 601, 610 [37 L.Ed.2d 830, 839, 93 S.Ct. 2908] (1973).

Petitioner recognizes the expressed probable non-applicability of the overbreadth doctrine in the context presented here. Bates v. State Bar, supra, ___ U.S. ___, 53 L.Ed.2d at 834. However, he perceives that standing is conferred on the basis that this is a criminal case, relying on the somewhat dubious proposition that the "in terrorem effect" of potential typical misdemeanor sentences[2/] is more likely to chill protected speech than the certainty of disciplinary action

2/ Petitioner was sentenced to pay a $500 fine and perform 500 hours of pro bono legal service through the Legal Aid Foundation or a similar organization.

by the State Bar.[3/]

Petitioner submits no authority that the rule of standing to assert overbreadth differs in criminal, quasi-criminal and civil cases, and Respondent submits the rule is at least as, and possibly more, strict in criminal cases. McGowan v. Maryland, supra; Broadrick v. Oklahoma, supra, 413 U.S. at 613, 37 L.Ed.2d at 841.

In the final analysis the narrow question here is whether "capping", "running" and "ambulance chasing" by lay persons is to be declared protected by the First Amendment, not because Petitioner may vicariously assert the constitutional rights of such lay persons, but because if the State may not criminalize such conduct without trampling on the First Amendment, Petitioner cannot be criminally liable for aiding and abeting lawful conduct.

3/ In Goldman v. State Bar of California, supra, factually similar to this case, two attorneys were suspended from the practice of law for one year and until each passed the Professionsl Responsibility Examination; also, they were required to notify all clients, opposing counsel, etc., of their suspension and disqualification, and to refund unearned fees.

2. CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 6152 AND RELATED STATUTES AND RULES AS WRITTEN AND AS CONSTRUED BY CALIFORNIA COURTS ARE NOT CAPABLE OF APPLICATION TO CONDUCT PROTECTED BY THE FIRST AMENDMENT; THEY SEEK SOLELY TO PROSCRIBE "AMBULANCE CHASING" IN ALL OF ITS CLASSIC AND RESPLENDENT GLORY

Petitioner seeks to analyze the subject with the usual overbreadth "parade of horribles", i.e., by showing conceivable hypothetical situations which might possibly arise in enforcement of § 6152.

The obvious trouble with Petitioner's analysis is that it assumes that "manifestly strong medicine" should be applied pursuant to his suggestion, rather than sparingly and as a last resort; it also assumes that California State Bar investigators (who usually prepare such cases) and California prosecutors and courts will be ignorant and insensitive to First Amendments rights and issues, and incapable of applying the law other than in an unconstitutional manner.

Reduced to its essence, Petitioner's

argument concedes that "ambulance chasing" is not entitled to First Amendment protection, it concedes the venality and mendacity of his conduct, but maintains that his conviction should nevertheless be set aside because the statute he admitted violating is (he contends) capable of construction infringing First Amendment rights.

Respondent submits that California Business & Professions Code § 6152 is not capable of application in the strictly hypothetical situations conjured by Plaintiff. For instance, subdivision (c) states: states:

> "Nothing in this section shall be construed to prevent the recommendation of professional employment where such recommendation is not prohibited by the Rules of Professional Conduct of the State Bar of California." (emphasis added)

The Rules of Professional Conduct require a pecuniary reward to flow from the attorney to the person soliciting in return for obtaining employment. California Rules of Professional Conduct, Rule 2-104(3), formerly Rule 3; Alpers v. Hunt,

86 Cal. 78 (1890); People v. Levy, 8 Cal. App.2d Supp. 763 (1935); Hildebrand v. State Bar, 18 Cal.2d 816 (1941).

Similarly, subdivision (d) of § 6152 confirms the right of a public defender or court appointed counsel to make known his availability to indigents, whether they are in or out of jail.

Petitioner has cited no case in the forty-seven year history of § 6152 or the Rules of Professional Conduct which justifies his contention that overbreadth exists. Instead, consistent construction by California Courts has limited the application of the laws and rules to those situations where the capper is remunerated for obtaining employment for a lawyer. More than a mere recommendation is required, and § 6152 does not, as Plaintiff says, establish a "blanket suppression." People v. Levy, supra, In other words, § 6152 only affects economic considerations, not constitutional rights. See McGowan v. Maryland, supra, 366 U.S. at 429, 6 L.Ed.2d at 401.

3. NO IMPORTANT INTEREST, FIRST AMENDMENT OR OTHERWISE, JUSTIFIES "AMBULANCE CHASING." STATE PROHIBITION OF "AMBULANCE CHASING" IS JUSTIFIED BY IMPORTANT AND SUBSTANTIAL INTERESTS UNRELATED TO SUPPRESSION OF FREE EXPRESSION OF IDEAS.

California Business and Professions Code § 6152 does not interfere with a consumer's right to receive information where most needed, in hospitals, jails, etc. First, the premise that one always needs the services of an attorney while still hospitalized is not necessarily valid. Subdivision (b) of § 6152 makes liability releases signed within fifteen days of hospitatlization presumptively fraudulent, and Respondent is not persuaded that a recently hospitalized or jailed consumer is in the best position to make a well reasoned decision to hire a particular attorney based on statements made by an unexpected lay solicitor. Second, nothing in § 6152 prohibits lay recommendation of an attorney, any place and any time, so long as there is no reward to the lay person for doing so. Third, it is submitted that persons hospitalized

and jailed, or their friends and relatives, are likely to and do have adequate means to assert their rights without the unexpected and uninvited solicitation of a capper. Cf. McGowan v. Maryland, supra.

This Court now has before it Ohralik v. Ohio State Bar Association, docket no. 76-1650, in which the State Bar of California has filed an amicus curiae brief. Respondent feels the interests and justifications of the State in prohibiting "ambulance chasing" are adequately set forth therein, as well as in the opinion below of the Appellate Department of the Superior Court in this case.

CONCLUSION

Albert Ohralik seeks an extension of First Amendment protection to his in-person solicitation of clients. David Kitsis seeks a further extension of that principle, if it exists at all, to the purely economic interest of lay persons to solicit and obtain clients on his behalf.

Respondent thinks that the Constitution does not set such a standard for the practice of a once, and hopefully still, honorable profession. Lest law schools begin issuing rubber-soled shoes and police radio scanners in place of diplomas, the petition should be denied.

Respectfully submitted,

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